

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GENEVIEVE JOYCE WACKER)	
Claimant)	
VS.)	
)	
WAL-MART)	Docket No. 1,007,515
Respondent)	
AND)	
)	
AMERICAN HOME ASSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the March 10, 2004 Award of Administrative Law Judge John D. Clark. Claimant was awarded a 5 percent permanent partial general disability on a functional basis after the Administrative Law Judge (ALJ) determined that claimant had not acted in good faith when she was terminated for cause from respondent, thereby limiting her, under K.S.A. 44-510e, to a functional impairment only. The Appeals Board (Board) heard oral argument on June 15, 2004.

APPEARANCES

Claimant appeared by her attorney, Kelly W. Johnston of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kendall R. Cunningham of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the ALJ. Additionally, the parties stipulated at oral argument that the 5 percent whole body impairment awarded by the ALJ was the appropriate functional impairment to be awarded in this matter, with the only dispute being claimant's entitlement to a permanent partial general work disability under K.S.A. 44-510e. Additionally, the parties stipulate that the deposition of Paul Wilkins, taken November 11, 2003, is part of the record and may be considered by the Board.

ISSUES

Claimant presented the following issues for review in her Application for Review by the Board of Appeals:

- “(1) Whether *Foulk* is applicable to the question of claimant’s eligibility for work disability benefits.
- “(2) Whether claimant’s alleged culpability in connection with her involuntary discharge was of such gravity and import as to destroy her eligibility for work disability compensation.
- “(3) Whether respondent’s bad faith offsets, neutralizes or, in any way, is relevant to the issue of whether claimant is entitled to work disability benefits.
- “(4) What is the nature and extent of claimant’s work disability pursuant to K.S.A. 44-510(e) [*sic*]?”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. Claimant was awarded a 5 percent impairment to the body as a whole after the ALJ determined that claimant’s termination for cause was appropriate, thereby denying her any permanent partial general disability under K.S.A. 44-510e. The Board adopts those findings and conclusions as its own, thereby awarding claimant a 5 percent impairment to the body as a whole.

Claimant worked in maintenance for respondent when she injured her back on September 6, 2002, lifting trash from a cart to place it into a dumpster. She received treatment by Robert L. Eyster, M.D., a board certified orthopedic surgeon, and was ultimately returned to work with respondent with specific restrictions. Those restrictions were met by respondent.

However, claimant was terminated from her employment on March 23, 2003, after respondent determined that she violated certain policies dealing with the wasting of respondent’s property. One of claimant’s duties involved the replacing of toilet paper rolls in various bathrooms around respondent’s store. Claimant had, on a prior occasion, been counseled regarding replacing the rolls before they were completely empty. Claimant testified that she was concerned about being able to get around the entire store and did

not want customers to run out of toilet paper before she had the opportunity to return. However, it is noted that the bathroom stalls in the store had places for two separate rolls at the same time. Additionally, the roll that claimant replaced on March 23 apparently was between a third and a half full.

Claimant had been counseled and provided a warning only thirteen days before the termination. At that time, she was given a coaching improvement form dated March 10, 2003, which stated that throwing unused product into the trash causes lost profits to the store. That form stated the next level of corrective action was termination. That form was signed by claimant and a management level employee of respondent.

Claimant alleges entitlement to a permanent partial general work disability under K.S.A. 44-510e. However, K.S.A. 44-510e must be considered in light of certain policies set forth by the Kansas appellate courts. In *Foulk*,¹ the Kansas Court of Appeals barred a claimant from receiving workers compensation benefits, finding that the claimant was capable of earning 90 percent or more of her pre-injury wage at a job within her restrictions, but failed to do so. In *Foulk*, the court held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the current statute) by refusing to attempt to perform an accommodated job which the employer had offered and which paid a comparable wage. The rationale behind that decision is that such a policy prevents claimants from refusing work and, thereby, exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but either overtly or, in essence, refuses to do so.² Before a claimant can claim entitlement to a work disability under K.S.A. 44-510e, he or she must first establish that a good faith effort has been made to obtain or retain appropriate employment.³ As noted above, a worker's good faith effort must not only be to obtain employment after leaving, but also to retain employment that that worker holds at the time of the injury.

The Board acknowledges that employers must also demonstrate good faith in their dealings with the employees. In providing accommodated employment to a worker, *Foulk* does not apply where the accommodated job is not genuine,⁴ or the accommodated job

¹ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

² *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

³ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁴ *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

violates a worker's medical restrictions,⁵ or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.⁶

In this instance, none of those qualifiers apply. Claimant had been returned to work within her restrictions and was performing her job duties. However, claimant's reluctance to follow respondent's instructions with regard to the wasting of company property was both willful and unjustified. There is no doubt claimant was aware of the instructions and warnings, as they were clearly provided. Claimant was not to waste the company property. Claimant knew of those instructions and the potential penalty if violated, as she signed the coaching improvement form on March 10, 2003. For reasons known only to claimant, she violated those instructions with full knowledge of the potential repercussions.

The Board finds that claimant's actions in that regard did not constitute a good faith effort to retain her employment. Therefore, under K.S.A. 44-510e, the Board will impute to claimant the wage she was earning at the time of her termination with respondent, thus limiting her to her functional impairment of 5 percent to the body as a whole.

The Board acknowledges that just because an employee was terminated due to reasons other than his or her injury does not necessarily preclude an award of wage loss for work disability benefits.⁷ However, in this instance, the Board finds that the policies of *Beck* do not apply, as the actions of claimant did not appear to have been made in good faith.

The Board, therefore, finds that claimant is limited to her functional impairment of 5 percent to the body as a whole and affirms the Award of the ALJ.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated March 10, 2004, should be, and is hereby, affirmed.

IT IS SO ORDERED.

⁵ *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

⁶ *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

⁷ *Beck v. MCI Business Services, Inc.*, 32 Kan. App. 2d 201, 83 P.3d 80 (2003).

Dated this ____ day of July 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director